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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO RAILWAY EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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On pages 8 and 9 of the petitioner's brief it is contended by the Government that Section 506 (a) of the Revenue Act of 1928 in limiting the effect of waivers filed after the expiration of the period for assessment was intended to change the situation from that under prior Revenue Acts. The statement was made (at page 8):

> There is nothing in the legislative history of the later Act [Revenue Act of 1928] which throws any light upon the view which Congress took of the earlier Act when passing the later statute.

This statement is incorrect. The legislative history of the Revenue Act of 1928 indicates that Congress did intend to change the statutory provisions concerning the validity of waivers filed after the expiration of the statutory period for assessment and collection. It was the belief of the House Committee on Ways and Means that waivers filed after the statutory period for assessment or collection had run were valid if filed prior to the 1926 Act.

The report of the House Committee on Ways and Means on the Revenue Act of 1928 (70th Congress, 1st Session, House Report, No. 2, page 29) states:

> SEC. 506. WAIVERS AFTER EXPIRATION OF STATUTE OF LIMITATIONS.
>
> Section 276 (b) of the new bill, incorporates a provision making it clear that the Commissioner and the taxpayer may consent, after the statute of limitations has run, to an assessment or collection of the tax within the period specified. Many instances arise where it is highly desirable to remove the bar of the statute of limitations.
>
> Section 506 of the new bill amends section 278 (c) and (d) of the 1926 Act, in order to apply this policy to taxes under the 1926 and prior acts. *Waivers filed prior to the 1926 Act are undoubtedly valid and have been so held by the Board of Tax Appeals.* However, on account of section 1106 (a) of the 1926 Act, some question has arisen as to the validity of a waiver filed after the expiration of the period of limitations and

> after the enactment of the 1926 Act. The proposed amendment removes this doubt, at least as to waivers filed after the amendment takes effect, by specifically making them valid. (Italics ours.)

On pages 12–14 of the brief for the respondent it is argued that Section 278 (c) of the Revenue Act of 1924, when read in connection with Section 281 (e) of that Act, renders invalid waivers executed after the statutory period for assessment and collection had expired. Section 281 (e) extends the time for making claims for refund if the taxpayer files an assessment waiver on or before a certain date. The respondent incorrectly states that this date is "before the statute of limitations had expired." In fact, Section 281 (e) of the 1924 Act and Section 284 (g) of the 1926 Act, which succeeded it, provide that the date shall be, except as to 1917 taxes, the arbitrary date of June 15, 1924, for 1918 taxes; June 15, 1925, for 1919 taxes; etc. These dates, of course, do not coincide with the expiration of the five-year period from the filing of the return. There is no reason to argue by analogy that the consents authorized in Section 278 (c) must similarly be filed prior to June 15th of the fifth year from the date of the return. Section 278 (c) does not specify any date before which the waivers must be filed in order to be valid.

Moreover, Sections 281 (e) of the 1924 Act and 284 (g) of the 1926 Act are statutes enacted solely for the benefit of the taxpayers. They enlarge the

period within which the taxpayer may file his claim for refund only if he has filed a certain waiver within a limited period. Sections 278 (c) of the Revenue Acts of 1924 and 1926 refer to waivers in general. There was no reason to limit such consents under Section 278 (c) to those filed before the expiration of the statutory period. Prior to the enactment of Section 281 (e) of the Revenue Act of 1924 all claims for refund of taxes were required to be filed within four years from the date the tax was paid. Section 3228, R. S., as amended by Section 1112 of the Revenue Act of 1926. The purpose of Section 281 (e) of the Revenue Act of 1924 and of 284 (g) of the Revenue Act of 1926 was to extend this period approximately fifteen months provided the taxpayer before a specified date filed a waiver of his right to have the taxes due for such taxable year determined and assessed at a later time. This is evident from the fact that under these two sections the consent of the Commissioner was not necessary to validate a waiver filed by the taxpayer for that purpose. It was not within the power of the Commissioner to defeat this remedial legislation by declining to consent to waivers filed. Thus, it is apparent that the waivers referred to in those sections are entirely different in nature from the consents authorized in Section 278 (c) of the Revenue Acts of 1924 and 1926, where the Commissioner and taxpayer must both consent in writing to the extension of the statutory period for

assessment. There is no analogy between the sections authorizing the filing of waivers by the taxpayer to extend the period for the filing of claims for refund and the sections authorizing consents in writing to a later assessment of taxes. Any comparison between the two is misleading.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, provides:

> Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C., Title 26, Sec. 1060.)

Section 281 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 302, provides:

> If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. (U. S. C., Title 26, Sec. 1065.)

Section 278 (c) of the Revenue Act of 1926 is identical with Section 278 (c) of the 1924 Act, *supra*.

Section 284 (g) of the Revenue Act of 1926, ch. 27, 44 Stat. 9, 67, provides in part:

> If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * *. (U. S. C. App. Title 26, Sec. 1065.)

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